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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 330

CHARLES CONLEY LYNCH, JOSEPH CARROLL AND RICHARD BERRY NORTON,

Petitioners,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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OPINION BELOW

The Court of Appeals of Maryland denied Certiorari on March 4, 1968, as noted in 2 Md. App. 546, 236 A. 2d 45. The Order of the Maryland Court of Appeals denying Certiorari appears in the Record at p..... The Opinion of the Court of Special Appeals of Maryland is reported in 2 Md. App. 546, 236 A. 2d 45, and is set out in the Appendix, *infra* pp. 1A to 21A.

JURISDICTION

The Court of Appeals of Maryland denied Certiorari on March 4, 1968. The judgment of the Criminal Court of

Baltimore City was affirmed by the Maryland Court of Special Appeals on December 6, 1967.

Jurisdiction to review the judgment in question by Writ of Certiorari is conferred under 28 U.S.C. Section 1257 (3) since rights, privileges, and immunities are claimed by Petitioners under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. Whether the common law charges of "conspiracy to incite a riot", "incitement to riot", and "disorderly conduct", on their face or as applied to this case, violate the First and Fourteenth Amendments to the United States Constitution.

2. Whether the conviction of petitioners is supported by any evidence as required by the due process clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Respondent accepts Petitioners' Statement of the Case, with the following additions:

Throughout the course of the rallies on July 25, 27 and 28, 1966, Petitioners' speeches were laced with calls on the crowd to "fight now", and they contained inflammatory and offense epithets directed towards Negroes, Jews and certain political institutions and office holders. Some of the remarks made during the course of the rallies were as follows:

July 25, 1966

Joseph Carroll — ". . . white people organize to fight yes, fight" (T. 239).[1] "The time has come for all white youths to unite and fight for white power. *Let's smash this nigger revolution here and now*" (T. 241). *"The time has come for us to fight* and that is exactly what we are going to do. How about you?" (T. 242) (Emphasis supplied.)

Richard Berry Norton — "Connie Lynch on the subject of violence is a moderate. I know he's a moderate. Connie Lynch personally told me he favors just enough moderate violence to get the niggers the hell out of America" (T. 243).

Charles Conley Lynch — "Certainly I believe in violence" (T. 252). "Anybody ask you to believe in non violence to defend what you believe is right you tell him 'Hell, yes, you believe in violence'. How you folk feel about it?" (T. 253). "We are going to kill all the niggers if it takes that to keep us white. How do you folks feel about that?" (T. 262) (Emphasis supplied).

July 27, 1966

Joseph Carroll — "Most of these nigger lovers are sick in the mind . . . they should be bound, hung and killed" (T. 272). ". . . if they want violence we'll give

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[1] The symbol "T" refers to the pagination of the Transcript of the Trial which is part of the Record.

it to them. White man, *that is the time to get your gun and kill your share of niggers* . . . we'll never, never have any racial peace and there can be no peace until the nigger hangs from every lamppost. (applause)" (T. 278). "White man fight" (T. 279) (Emphasis supplied).

Richard Berry Norton — "I know when they [C.O.R.E.] open up you white folks are going to beat the hell out of them" (T. 280).

Charles Conley Lynch — "Rise up and unite white man and fight" (T. 289).

July 28, 1966

John Carroll — "The white people aren't going to tolerate any more of this, *they are going to riot*. There is only one way [cries from the audience of white man fight]" (T. 298). "I want you to watch me: Raise your right fist and shake it. White man, fight" (T. 302) (Emphasis supplied).

Richard Berry Norton — "Are you ready to fight?" (T. 300).

Charles Conley Lynch — *"I know you are enthused with fight"* (T. 307) (Emphasis supplied).

Although the rallies were ostensibly held on behalf of the Citizens for Brailsford Committee, it appears that during the three nights of speeches, Mr. Brailsford's name was never mentioned. Further, although the scene of the rallies was in Patterson Park in Baltimore City, Mr. Brailsford was a candidate for the State Legislature from either Anne Arundel or Baltimore Counties (T. 37-38).

On the evening of July 28, part of the crowd listening to Petitioners' speeches began chasing two Negro boys who were merely passing through the park (T. 114, 115). Petitioner Carroll was seen leading the chase (T. 163-164). Also on the evening of July 28, an incident took place in the 200 block of Montford Avenue, about two blocks north of

Baltimore Street and one block from where Luzerne Street meets Patterson Park (T. 117-118). General George L. Gelston, Acting Police Commissioner of Baltimore City during July 1966, testified that the crowd on Montford Avenue had gone up from Patterson Park (T. 92). Another incident on July 28 took place near the swimming pool and basketball courts in Patterson Park. This incident involved a number of people who had been at the rally and had ran in that direction (T. 330, 447). Still another incident involved one Dennis Alexander, a 16 year old Negro youth who was walking his dog near Patterson Park on the night of July 28. He was beaten by a group of white boys and a rope was put around his neck (T. 421). The boys who inflicted the beating came from Patterson Park (T. 423). At least one of the boys involved in this beating was specifically identified as having been at the rally in Patterson Park (T. 435-436).

Major Wade Poole of the Baltimore City Police Department testified that on the evening of July 27, Petitioner Carroll pointed to members of CORE and said, "don't bother them now, let them listen to what we have to say, *then we'll get them*" (T. 176-204) (Emphasis supplied).

At the conclusion of the trial, the trial judge (Prendergast, J.) at the request of the parties gave his charge to the jury. He told the members of the Jury that under the Constitution of Maryland, the Jury is the Judge of both law and facts (T. 516-517). He also told them that it was the duty of the Court to advise the Jury upon the request of the parties, and that since he had been requested to do so, he was going to give them advisory instructions on the law. (T. 517).

The Jury was advised that a riot is a disturbance of the peace by three or more persons who carry out a common purpose in such a violent and turbulent manner as is cal-

culated to terrify others. They were further advised that inciting a riot means arousing or inducing others to commit a riot (T. 519). The Court went on to advise the Jury with regard to the burdens of proof, the meaning of "willfully", "disorderly conduct", "conspiracy" and on other phases of the law. (T. 519-521).

The Court advised the Jury that with regard to the right of free speech, the, "Federal Constitution guarantees to all men the right to freedom of speech. Speech is often provocative and challenging. It may create dissatisfaction with existing conditions or even stir people to resentment or anger. However, the right of free speech is not absolute. It does not protect the use of words which by their very utterance tend to incite an immediate breach of the peace, or to produce a clear and present danger of serious disorders or riots" (T. 526).

At the conclusion of the Judge's advisory instructions to the Jury, counsel for the State and Petitioners approached the Bench and were given an opportunity to take exception to the charge. Counsel for the Petitioners noted on the record that he had no objection (T. 532).

ARGUMENT

I.

The Common Law Charges of "Conspiracy To Incite Riot", "Incitement To Riot", and "Disorderly Conduct", Neither On Their Face Nor As Applied In The Present Case Violate the First and Fourteenth Amendments of the United States Constitution.

Taken as a whole, the charge to the jury given by Prendergast, J., in the trial of the case below fully, completely and properly protected all of Petitioner's rights of free speech as guaranteed by the First and Fourteenth Amend-

ments. The Court separately defined each of the terms riot, inciting to riot, disorderly conduct, willfully, etc. (T. 519-521). In addition to setting out the definitions of these terms, the Court clearly went on to spell out the constitutional guarantees extended to citizens when exercising their rights of free speech. The trial court below followed closely the pronouncements of this Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) and *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). The jury was thus charged that in order to convict Petitioners, it must find that Petitioners' words tended to incite conduct which was illegal, and would destroy or menace public order and tranquility, or would produce a clear and present danger of serious disorders or riots. *Cantwell v. Connecticut, supra*, p. 308. The definitions given by the Court below of the various words and phrases obviously were intended to help the jury determine if the words used by Petitioners incited the assembled crowd or was likely to incite the crowd to do such acts as would constitute a riot, or other disorderly conduct.

Petitioners' argument on the above point seems to suggest that neither a riot nor a disturbance of the public peace is such conduct as consitutes a clear and present danger to justify punishment therefor as being outside the scope of protected free speech. We submit that there is neither basis in fact or law for this proposition. Absent this theory, Petitioners' argument simply overlooks the Court's charge to the jury with respect to the bounds of one's constitutionally protected rights of free speech set out on p. 526 of the Transcript.

Contrary to Petitioners' argument that they were convicted of the crimes of incitement to riot, conspiracy to incite riot and disorderly conduct "solely by reason of

speeches that they made", it is clear that in fact Petitioners were convicted not for what they said, but the reaction to what they said, and their intention to obtain such reaction. See *Feiner v. New York*, 340 U.S. 316, 320 (1951).

In order for one's speech to go beyond the constitutionally protected bounds of free speech, it is not necessary that the words uttered actually cause a riot or disturbance of the peace, but it is sufficient if such words are ". . . *likely to produce* violence in others. No one would have the heartihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other *immediate threat* to public safety, peace or order, appears, the power of the state to prevent or punish is obvious." *Cantwell v. Connecticut, supra* at p. 308.

We also call to the attention of the Court that if, *arguendo*, the charge of the Court below to the jury was improper, Petitioners waived this defect and failed to preserve their right on appeal by not noting any exceptions to the charge as given. *Singer v. U. S.*, 380 U.S. 24 (1965); *Jackson v. Maryland*, 214 Md. 454 (1957), cert. denied 356 U.S. 940.

Petitioners take exception in their brief in this Court to the Trial Court's advisory instructions to the jury in that the Trial Court advised the jury that it (the jury) was the judge of the law as well as the facts under the Constitution of Maryland, and that the jury could arrive at its own independent conclusions on matters of law. This principle, though unusual to the State of Maryland,[2] has been long

[2] Indiana appears to still also have a similar constitutional provision.

founded in the Constitution of this State. Article 15, Section 5, Constitution of Maryland. The constitutionality of this provision has been consistently upheld by the Maryland Court of Appeals.[3] This Court has had occasion in the past to consider this provision of the Maryland Constitution, and has not intimated any doubt of its constitutionality. In *Giles v. Maryland*, this issue was raised along with others, but the appeal was dismissed by this Court for want of a substantial federal question. 372 U.S. 767 (1963). Also, in *Brady v. Maryland*, 373 U.S. 83 (1963) this Court took note of Section 5 of Article 15 of the Maryland Constitution without questioning its constitutionality. In *Wyley v. Warden*, 372 F. 2d 742 (4th Cir. 1967) the constitutionality of this Maryland provision was specifically upheld.

II.

The Conviction of Petitioners Was Amply Supported by Evidence Sufficient to Satisfy the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

On this issue of the case, there does not appear to be any dispute as to the applicable law, but the dispute rather, centers around the application of the law to the existing facts. The law in this area has been well set out in numerous previous Supreme Court cases.

The language of this Court in *Cantwell*, at page 308 cited above is opposite here, particularly since the Court was there considering the Connecticut common law crime of breach of the peace. In *Cantwell* it was also noted that:

> "There are limits to the exercise of these liberties [freedom of speech, etc.]. The danger in these times

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[3] *Slansky v. State*, 192 Md. 94, 63 A. 2d 599 (1949); *Giles v. State*, 229 Md. 370, 183 A. 2d 359 (1962).

from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish."

Two years after *Cantwell*, this Court added to the clear and present danger test the "fighting words" doctrine in *Chaplinsky v. New Hampshire, supra*. It said:

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

In *Feiner v. New York, supra*, this Court again had occasion to comment on the application of the clear and present danger test to a specific set of facts before it. There it was noted:

"This Court respects, as it must, the interest of the community in maintaining peace and order on its streets. . . . It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace." pp. 320-321.

Petitioners, in the trial below, and in their briefs on appeal, have attempted to make much of their alleged efforts

to cooperate with the police and to urge the crowd to not commit violent acts. When considered in the light of Petitioners' entire speeches, the tone of the speeches, and the mood and temperament of the crowd created intentionally by Petitioners' speeches, it is readily seen that Petitioners' supposed calls for non-violent action by the crowd were as empty as a vacuum sealed can of air. It reminds one of the old vaudeville act in which the comedian raised his left hand as if to quiet the crowd's applause, but with his right hand held low visibly and even urgently called on them to continue their show of appreciation. What else could the speakers have been urging but violence, rioting, civil disorder and breach of the peace when they told the crowd: "Let's smash this Nigger Revolution here and now" (T. 241). "The time has come for us to fight and that is exactly what we are going to do" (T. 242). "Certainly I believe in violence. . . . We are going to kill all of the Niggers if it takes that to keep us white. How do you folks feel about that?" (T. 252-262). "We'll never, never have any racial peace and there can be no peace until a Nigger hangs from every lamp post (Applause)" (T. 278). Led on by Petitioners in their speeches, the crowd over and over again shouted "White man fight".

Petitioners argue in their Brief that during and following the rallies on July 28, 1966, there were "only a few incidences". Respondents suggest that the films of these "few incidences" graphically show the very serious nature of the outbreaks that took place during the rally on the 28th and following the speeches that evening. It is particularly interesting to note that the two major incidences, that is, the one involving a group of mixed Negro and white boys playing basketball at a court in Patterson Park, and the attempted lynching of a Negro youth who was out walking

his dog near Patterson Park, involved victims completely innocent of any association with the rallies. The same cannot be said for the perpetrators of the violence. They were specifically identified by a number of witnesses as having come directly from the rally (T. 92, 330, 423, 435-436, 447).

Petitioners argue that there could not have been a clear and present danger existing on the night of the 28th since there was only one minor injury reported. We make reference only to the near lynching of young Alexander. Do Petitioners mean to suggest that their conviction could only be allowed to stand if young Alexander and others had been found swaying from the end of ropes thrown over trees and lamp posts in the area, their feet hanging limply in the air, and the breath of life literally choked from them? The mere suggestion is preposterous. Certainly, there is nothing contained in *Cantwell, Chaplinsky, Feiner,* or any of the other applicable Supreme Court cases which suggest any such needed result.

There is a very obvious difference between the case at bar and the situation before this Court in *Cox v. Louisiana,* 379 U.S. 536 (1965) cited by Petitioners in their brief. In *Cox* the threat to peace and order of the community was created as a result of the "muttering" and "grumbling" of white onlookers who were violently opposed to petitioners and their avowed intent to carry out a non-violent protest against segregation. In the present case, a clear and present danger was created not because others took exception to the views of the speakers at the Patterson Park rallies, but because the very words of the speakers called on those in the crowd who agreed with them to go out and riot, kill, maim and create civil disorder and disobedience. In this respect, the case before this Court is much more akin to the *Feiner* case, *supra.*

Respondents submit that upon a complete review of the evidence in this case, including a review of the documentary evidence (films and taped recordings), it is clear beyond any reasonable doubt that the words spoken by Petitioners on July 28, 1966, went beyond any constitutionally protected bounds of free speech and created a clear and present danger of imminent public disorders so as to constitute a very real threat to the peace and safety of not only the people in the immediate vicinity of Patterson Park in Baltimore City, but probably the entire city.

CONCLUSION

For the reasons set out above, it is respectfully submitted that Certiorari should be denied.

Respectfully submitted,

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